

Department of the Army, DoD

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be forwarded to HQDA(CECC-K), WASH DC 20314-1000.

(2) All other records will be forwarded to the appropriate office at HQDA (See § 516.42).

(c) *Fees and charges.* AR 37-60 prescribes the schedule of fees and charges for searching, copying, and certifying Army records for release in response to litigation-related requests.

(d) *Release of records of other agencies.* Normally an individual requesting records originating in agencies outside DA (that is, FBI reports, local police reports, civilian hospital records) that are also included in Army records should be advised to direct his inquiry to the originating agency.

§ 516.44 Determination of release authorization.

(a) *Policy.* DA policy is to make official information reasonably available for use in Federal and state courts and by other governmental bodies unless the information is classified, privileged, or otherwise protected from public disclosure.

(b) *Releasability factors.* In deciding whether to authorize release of official information, the deciding official should consider the following:

(1) Has the requester complied with DA policy governing the release of official documents in § 516.41(d) of this part.

(2) Is the request unduly burdensome or otherwise inappropriate under the applicable court rules?

(3) Is the disclosure appropriate under the rules of procedure governing the matter in which the request arose?

(4) Would the disclosure violate a statute, executive order, regulation, or directive?

(5) Is the disclosure appropriate under the relevant substantive law concerning privilege?

(6) Would the disclosure reveal information properly classified pursuant to the DOD Information Security Program under AR 380-5, unclassified technical data withheld from public release pursuant to 32 CFR § 250, or other matters exempt from unrestricted disclosure?

(7) Would disclosure interfere with ongoing enforcement proceedings, compromise constitutional rights, reveal

the identity of an intelligence source or confidential informant, disclose trade secrets or confidential commercial or financial information, or, otherwise be inappropriate under the circumstances?

(8) Would the disclosure violate any person's expectation of confidentiality or privacy?

§ 516.45 Records determined to be releasable.

If the deciding official, after considering the factors set forth in § 516.44, determines that all or part of requested official records are releasable, copies of the records should be furnished to the requester.

§ 516.46 Records determined not to be releasable.

(a) *General.* If the deciding official, after considering the factors in § 516.44, determines that all or part of requested official records should not be released, he will promptly communicate directly with the attorney or individual who caused the issuance of the subpoena, order, or request and seek to resolve the matter informally. If the subpoena or order is invalid, he should explain the basis of the invalidity. The deciding official should also explain why the records requested are privileged from release. The deciding official should attempt to obtain the agreement of the requester to withdraw the subpoena, order, or request or to modify the subpoena, order, or request so that it pertains only to records which may be released. (See figure G-1, appendix G, of this part.)

(b) *Information protected by the Privacy Act.* (1) A subpoena duces tecum or other legal process signed by an attorney or clerk of court for records protected by the Privacy Act, 5 U.S.C. 552a, does not justify the release of the protected records. The deciding official should explain to the requester that the Privacy Act precludes disclosure of records in a system of records without the written consent of the subject of the records or "pursuant to the order of a court of competent jurisdiction." (See 5 U.S.C. 552a(b)(11)). An "order of the court" for the purpose of subsection 5 U.S.C. 552a(b)(11) is an order or writ requiring the production of the

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records, signed by a judge or magistrate.

(2) Unclassified records otherwise privileged from release under 5 U.S.C. 552a may be released to the court under either of the following conditions:

(i) The subpoena is accompanied by an order signed by a judge or magistrate, or such order is separately served, that orders the person to whom the records pertain to release the specific records, or that orders copies of the records be delivered to the clerk of court, and indicates that the court has determined the materiality of the records and the nonavailability of a claim of privilege.

(ii) The clerk of the court is empowered by local statute or practice to receive the records under seal subject to request that they be withheld from the parties until the court determines whether the records are material to the issues and until any question of privilege is resolved.

(iii) Subpoenas for alcohol abuse or drug abuse treatment records must be processed under 42 U.S.C. 290dd-3 and 290ee-3, and Public Health Service regulations published at 42 CFR 2.1–2.67.

(iv) Upon request, SJAs and legal advisers may furnish to the attorney for the injured party or the tortfeasor's attorney or insurance company a copy of the narrative summary of medical care that relates to a claim under subpart E of this part. If additional medical records are requested, only those that directly pertain to the pending action will be furnished. If furnishing copies of medical records would prejudice the cause of action, the matter will be reported to Litigation Division.

(c) *Referral to Litigation Division.* If the SJA or legal adviser is not able to resolve a request for Army records informally, he should contact Litigation Division.

(1) Litigation Division may respond to subpoenas or orders for records privileged from release by informing the local U.S. Attorney about the subpoena and requesting that office file a motion to quash the subpoena or a motion for a protective order. The records privileged from release should be retained by the custodian pending the court's ruling upon the government's motion.

(2) When a motion to quash or for a protective order is not filed, or the motion is unsuccessful, and the appropriate DA official has determined that no further efforts will be made to protect the records, copies of the records (authenticated if necessary) will be submitted to the court (or to the clerk of court) in response to the subpoena or order.

(d) *Classified and privileged materials.* Requests from DOJ, U.S. Attorneys, or attorneys for other governmental entities for records which are classified or otherwise privileged from release will be referred to Litigation Division. (See §516.41(g).)

DA PERSONNEL AS WITNESSES IN PRIVATE LITIGATION

§516.47 Response to subpoenas, orders, or requests for witnesses.

(a) *Policy.* The involvement of present or former DA personnel in private litigation is solely a personal matter between the witness and the requesting party, unless one or more of the following conditions apply:

(1) The testimony involves official information. (See appendix F—Glossary to this part).

(2) The witness is to testify as an expert.

(3) The absence of the witness from duty will seriously interfere with the accomplishment of a military mission.

(b) *Former DA personnel.* Former DA personnel may freely respond to requests for interviews and subpoenas except in instances involving official information (paragraph (a)(1) of this section) or concerning expert testimony prohibited by §516.49. In those instances, the subject of the request or subpoena should take the action specified in §§516.41(c) and 516.42.

(c) *Present DA personnel.* Present DA personnel will refer all requests for interviews and subpoenas for testimony in private litigation through their supervisor to the appropriate SJA or legal adviser.

(d) *Discretion to testify.* Any individual not wishing to grant an interview or to testify concerning private litigation may seek the advice of an Army attorney concerning the consequences, if